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Apprendi v. New Jersey: Back to the Future?

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I. INTRODUCTION

In June 2000, the United States Supreme Court significantly altered the course of determinate sentencing law by deciding, in *Apprendi v. New Jersey*,[1] that all "sentencing factors" (other than prior convictions) that have the effect of raising a defendant's sentence above the maximum authorized by the statute defining the crime of conviction must be found by a jury beyond a reasonable doubt. The impact on determinate sentencing systems has been sudden and dramatic. In the year since the Court's opinion, more than four hundred federal and state court decisions have dealt with *Apprendi* issues,[2] and a recent article in the Federal Sentencing Reporter listed forty-eight federal statutes that either have been or may soon be challenged under *Apprendi*.[3] And this may represent only the tip of the iceberg. Given the many still-unanswered questions about the scope of *Apprendi*, and the possibility of more bombshells yet to come, it seems a safe bet that *Apprendi* and its progeny will dominate the field of determinate sentencing law into the foreseeable future.

Although *Apprendi* clearly surprised many observers, there is a palpable sense of constitutional deja vu about the case. The theoretical issue underlying *Apprendi* – namely, to what extent can a legislature, consistent with constitutional requirements, shift a factor from an "element of the crime" to a "sentencing factor" – is closely analogous to another theoretical issue that garnered much attention more than thirty years ago. During the 1970s and 1980s, the Court struggled mightily (and, in the opinion of many, futilely) with the following question: To what extent can a legislature, consistent with constitutional requirements, shift the burden of persuasion in a criminal case by redefining a factor from an "element of the crime" to an "affirmative defense?" After a series of controversial Court decisions[4] and a

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1. 530 U.S. 466, 120 S. Ct. 2348 (2000).

2. *See, e.g.*, United States v. Robinson, 241 F.3d 115, 121 (1st Cir. 2001) (holding defendant's theoretical exposure to higher statutory maximums did not violate *Apprendi*); United States v. White, 240 F.3d 127, 135 (2d Cir. 2001) (allowing the imposition of consecutive sentences, even if it leads to a punishment longer than *Apprendi* permits, so long as each sentence itself falls within the statutory maximum); United States v. Kinter, 235 F.3d 192, 199 (4th Cir. 2000) (holding that *Apprendi*'s relevant "maximum" is found on the face of the statute criminalizing the offense rather than in the sentencing guidelines).

3. *See* Nancy J. King & Susan R. Klein, *Apres* Apprendi, 12 FED. SENT. REP. 331, 336-38 (2000) (Appendix A) (listing federal statutes subject to *Apprendi* challenge).

4. *See* Martin v. Ohio, 480 U.S. 228 (1987) (holding prosecution must prove there was heat of passion or sudden provocation in homicide case rather than requiring defendant to establish that defense); Patterson v. New

flurry of academic commentary[5] on the subject, however, the "affirmative defense" issue largely faded from view, only to be revived in an entirely different context by *Apprendi*.[6]

This essay, unlike some of the others in this issue,[7] does not propose a solution to the so-called *Apprendi* problem in determinate sentencing. Rather, its goal is more modest. In this essay, I will comment about several aspects of the relationship between the "sentencing factor" issue in *Apprendi* and the earlier "affirmative defense" issue. Why, so many years after the original "affirmative defense" cases, did the Court suddenly become concerned about the constitutional status of "sentencing factors?" What, if anything, can be learned from studying the similarities and differences between these two issues? Why did the "affirmative defense" issue vanish so abruptly from the legal radar screen after the 1980s? Will the *Apprendi* issue turn out to be similarly short-lived? The answers to these questions may hold the key to a better understanding of *Apprendi*, and by addressing them herein I hope to contribute to the ongoing dialogue about how best to reconcile determinate sentencing with the Constitution.

II. *APPRENDI V. NEW JERSEY*: THE SUPREME COURT'S DECISION

In early 1995, Charles C. Apprendi, Jr., was indicted by a New Jersey grand jury and charged with numerous state law crimes relating to several incidents in which shots were fired at the home of an African-American family who had moved into a previously all-white New Jersey neighborhood. Apprendi eventually agreed to

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York, 432 U.S. 197 (1977) (holding prosecution must prove all elements included in the charged offense, but proof of absence of all affirmative defenses is not required); Mullaney v. Wilbur, 421 U.S. 684 (1975) (holding defendant can be given the burden of proving that she acted in self-defense in committing a murder).

5. *See, e.g.*, John C. Jeffries & Paul B. Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325 (1979); Ronald J. Allen, Mullaney v. Wilbur, *the Supreme Court, and the Substantive Criminal Law: An Examination of the Limits of Legitimate Intervention*, 55 TEX. L. REV. 269 (1977) [hereinafter Mullaney v. Wilbur]; Ronald J. Allen, *The Restoration of* In re Winship*: A Comment on the Burdens of Persuasion in Criminal Cases After* Patterson v. New York, 76 MICH. L. REV. 30 (1977) [hereinafter *The Restoration*]; Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299 (1977).

6. The "affirmative defense" cases are not the only ones in which the Court has faced an *Apprendi*-like issue, although they are certainly the most closely analogous ones. In the late 1970s and 1980s, the Court also addressed the extent to which a legislature can, consistent with constitutional requirements, create a presumption with respect to an "element of a crime." *See* Francis v. Franklin, 471 U.S. 307 (1985); Sandstrom v. Montana, 442 U.S. 510 (1979).

And, in the 1990s, the Court dealt with a Montana statute that eliminated voluntary intoxication as the basis for a mens rea defense, which – depending on the interpretation of the statute – could be said to have the same effect as creating a presumption with respect to the mens rea element of the crime. *See* Egelhoff v. Montana, 518 U.S. 37 (1996); Ronald J. Allen, *Supreme Court Review: Foreword:* Montana v. Egelhoff *– Reflections on the Limits of Legislative Imagination and Judicial Authority*, 87 J. CRIM. L. & CRIMINOLOGY 633 (1997); Peter Westen, *Egelhoff Again*, 36 AM. CRIM. L. REV. 1203 (1999).

7. *See* Stephen A. Saltzburg, *Due Process, History, and* Apprendi v. New Jersey, 38 AM. CRIM. L. REV. 243 (2001) (in this issue); Benjamin J. Priester, *Constitutional Formalism and the Meaning of* Apprendi v. New Jersey, 38 AM. CRIM. L. REV. 281 (2001) (in this issue).

plead guilty to two firearms possession counts, carrying a possible sentence of five to ten years each, and one bomb possession count, carrying a possible sentence of three to five years. The prosecution reserved the right to seek an enhanced sentence under the New Jersey hate crime law,[8] based on an allegation that Apprendi's crimes were motivated by racial bias. At the plea hearing, the trial judge, after hearing conflicting evidence (including Apprendi's testimony that the crimes were caused by alcohol abuse, not racial bias), found "by a preponderance of the evidence" that the crimes were committed "with a purpose to intimidate."[9] The judge therefore sentenced Apprendi, under the hate crime law, to a twelve-year enhanced sentence on one of the firearms possession counts, and to shorter concurrent sentences on the other two counts. The New Jersey appellate courts affirmed the enhanced sentence.[10]

The United States Supreme Court, by a five to four vote, reversed, concluding that Apprendi was constitutionally entitled, under the Sixth Amendment's jury trial provision and the Due Process Clause, to have a jury find beyond a reasonable doubt all of the facts on which his enhanced sentence was based. Justice Stevens's lead opinion began (in relevant part) by explaining that "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding."[11] He stressed that "nothing in this history suggests that it is impermissible for judges to exercise discretion – taking into consideration various factors relating both to offense and offender – in imposing a judgment within the range prescribed by statute,"[12] but noted the "novelty" of a statute like New Jersey's that "removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone."[13] Justice Stevens found support for his view in two earlier Court decisions. The first was *In re Winship*,[14] which held that all elements of a crime must be found by a jury beyond a reasonable doubt. The second was *Mullaney v. Wilbur*,[15] which barred legislatures from effectively

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8. This law provides for an "extended term" of imprisonment – increasing the punishment for a second-degree offense, like the ones committed by Apprendi, to between 10 and 20 years in prison – based on a finding by the trial judge, by a preponderance of the evidence, that the "defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." N.J. STAT. ANN. § 2C:44-3(e) (West 1995).

9. State v. Apprendi, 698 A.2d 1265, 1267 (N.J. Super. Ct. App. Div. 1997), *aff'd*, 731 A.2d 485 (N.J. Sup. Ct. 1999).

10. *Id.* at 1271.

11. *Apprendi*, 120 S. Ct. at 2356.

12. *Id.* at 2358.

13. *Id.* (emphasis in original).

14. 397 U.S. 358 (1970).

15. 421 U.S. 684 (1975).

creating presumptions with respect to the elements of a crime by converting those elements into "affirmative defenses" that must be proved by the defendant.[16]

In the next section of his opinion, Justice Stevens distinguished *McMillan v. Pennsylvania*,[17] where the Court had upheld a statute creating a mandatory minimum penalty for anyone found by the trial judge, on a preponderance standard, to be "visibly possess[ing] a firearm" during the commission of certain crimes, on the ground that in *McMillan*, the presence of the "sentencing factor" affected only the minimum penalty and did not cause the statutory maximum penalty to be exceeded.[18] He also distinguished *Almendarez-Torres v. United States*[19] because that case dealt solely with the factor of recidivism and, in any event, the defendant had admitted the existence of his prior convictions.[20] Citing *Jones v. United States*,[21] a statutory construction case decided just one year before *Apprendi*, Justice Stevens concluded: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[22] Finally, applying the above principle to the New Jersey hate crime law, Justice Stevens concluded that the practice of allowing the trial judge to make the necessary factual findings, under a preponderance standard, "cannot stand."[23]

There were two concurring opinions and two dissents. In concurrence, Justice Thomas, joined by Justice Scalia, (1) delved much deeper into the history of the Sixth Amendment jury trial right than did Justice Stevens; (2) expressed the view that *Almendarez-Torres* was wrongly decided (despite the fact that he had voted with the majority in that case); (3) speculated that *McMillan* was also likely incorrectly decided; and (4) expressly left for another day the possible implications of *Apprendi* for the law of the death penalty, and for the Federal Sentencing Guidelines.[24] In dissent, Justice O'Connor, joined by Chief Justice Rehnquist and Justices Kennedy and Breyer, (1) challenged the historical accounts, as well as the interpretations of precedent, of both Justice Stevens and Justice Thomas; (2) questioned whether the *Apprendi* rule, under two possible narrow readings, would make any difference at all; (3) argued that the *Apprendi* rule, under a possible

16. *Apprendi*, 120 S. Ct. at 2359.

17. 477 U.S. 79 (1986)

18. *Apprendi*, 120 S. Ct. at 2360. In a footnote, Justice Stevens denied the dissent's claim that he was overruling *McMillan*, saying that he was merely "limit[ing] its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict." *Id.* at 2361 n.13.

19. 523 U.S. 224 (1998).

20. *Apprendi*, 120 S. Ct. at 2361-62. Describing *Almendarez-Torres* as "at best an exceptional departure from the historic practice that we have described," Justice Stevens opined that the case "arguabl[y] . . . was incorrectly decided," and might someday need to be reconsidered, but put off such reconsideration until another day since "Apprendi does not contest the decision's validity." *Id.*

21. 526 U.S. 227 (1999).

22. *Apprendi*, 120 S. Ct. at 2362-63.

23. *Id.* at 2363.

24. *Id.* at 2367-80 (Thomas, J., concurring).

broad reading, would invalidate "all determinate sentencing schemes in which the length of a defendant's sentence within the statutory range turns on specific factual determinations;"[25] and (4) claimed that *Apprendi* thus might "have the effect of invalidating significant sentencing reform accomplished at the federal and state levels over the past three decades."[26] Also in dissent, Justice Breyer, joined by the Chief Justice, wrote primarily about the many benefits of determinate sentencing.[27] Finally, in concurrence, Justice Scalia responded to Justice Breyer's dissent, asserting that "the Constitution [does not mean] what we think it ought to mean . . . ; it means what it says."[28]

III. WHY THE SUDDEN CHANGE OF HEART?

One of the most interesting questions about *Apprendi* is this: Why did the Court so suddenly develop such concern about the constitutionality of "sentencing factors?" After all, "sentencing factors" are not a recent development; in one form or another, they have been around for a long time. Yet, in the twenty-five years between *Mullaney* and *Apprendi*, no decision of the Court ever had ruled against the use of such "sentencing factors" on constitutional grounds.[29]

Indeed, at almost exactly the same time that the Court first was grappling with the "affirmative defense" issue in *Mullaney* and another similar case, *Patterson v. New York*,[30] it was prodding the states, in a different series of cases, to adopt the use of so-called "aggravating circumstances" as a virtual constitutional prerequisite for the imposition of the death penalty. These "aggravating circumstances" operate much like the "sentencing factors" at issue in *Apprendi*.

In 1972, in *Furman v. Georgia*,[31] the Court struck down all then-existing state capital punishment statutes on the ground that they violated the Eighth Amendment's Cruel and Unusual Punishment Clause because the death penalty was being

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25. *Id.* at 2391 (O'Connor, J., dissenting).

26. *Id.* at 2394 (O'Connor, J., dissenting).

27. *Id.* at 2396-2402 (Breyer, J., dissenting). Justice Breyer was one of the original members of the United States Sentencing Commission, which wrote the first set of Federal Sentencing Guidelines.

28. *Id.* at 2367 (Scalia, J., concurring).

29. In *Jones v. United States*, 526 U.S. 227 (1999), the Court held that the federal carjacking statute, which defines different punishment ranges based on, for example, whether or not the victim was harmed, actually created separate crimes (rather than establishing mere "sentencing factors"). The decision in *Jones*, however, was based primarily on nonconstitutional statutory construction grounds, together with the "constitutional doubt" doctrine (under which the Court will interpret an ambiguous statute in a manner that avoids the possible creation of a constitutional problem).

The only other case in which the Court previously had ruled against a statute's constitutionality because it permitted a defendant's sentence to be based on a finding that "was not an ingredient of the offense charged" was *Specht v. Patterson*, 386 U.S. 605, 608 (1967). But *Specht* predated *Mullaney*. Moreover, *Specht* later was described by the Court as having involved "a radically different situation from the usual sentencing proceeding." Almendarez-Torres v. United States, 523 U.S. 224, 241-42 (1998) (quoting McMillan v. Pennsylvania, 477 U.S. 79, 89 (1986)).

30. 432 U.S. 197 (1977).

31. 408 U.S. 238 (1972).

imposed under such statutes in an arbitrary and unpredictable manner. Within a few years after *Furman*, however, many states adopted new statutes based on the Model Penal Code's proposed "guided discretion" approach.[32] This approach relied on the use of "aggravating circumstances" and "mitigating circumstances" to guide the sentencer's discretion and thereby (at least in theory) bring a modicum of rationality and predictability to capital sentencing.

"Aggravating circumstances" in capital cases operate in the following manner: After the defendant is convicted of first-degree murder, the case proceeds to a separate sentencing hearing at which the sole focus is the defendant's punishment. At the sentencing hearing, the prosecution is required to establish the existence of one or more of the "aggravating circumstances," or reasons to give the defendant the death penalty, which usually are set out in detail in the state's capital punishment statute. The defense also has the opportunity to prove "mitigating circumstances," or reasons to give the defendant a punishment other than death. The sentencer must consider both the "aggravating circumstances" and any "mitigating circumstances" in deciding whether the defendant should live or die.

In 1976, in *Gregg v. Georgia*[33] and its four companion cases,[34] the Court upheld the new "guided discretion" statutes, concluding that they were likely to make death sentences less arbitrary and thereby bring capital punishment back into compliance with the Eighth Amendment. Although the Court stopped short of holding that "aggravating circumstances" themselves were constitutionally mandated,[35] the overall message of *Gregg* and its companion cases was that "guided discretion" – based on the use of "aggravating circumstances" and "mitigating circumstances" – represented the constitutionally preferred method for administering a system of capital punishment. Today, all but a small handful of states, and the federal government, use "aggravating circumstances" and "mitigating circumstances" as the key component of their respective capital sentencing systems.

What is crucial for present purposes about these capital cases is that, in the absence of proof of at least one statutory "aggravating circumstance," the defen-

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32. See MODEL PENAL CODE § 210.6(3) (aggravating circumstances), § 210.6(4) (mitigating circumstances) (Proposed Official Draft 1962).

33. 428 U.S. 153 (1976).

34. *See* Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

35. In fact, one of the three Court-approved capital punishment statutes – the one adopted in Texas – followed a slightly different approach, in which the sentencer was required to consider three questions in the process of deciding on the defendant's sentence: "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." *See Jurek*, 428 U.S. at 269. If the sentencer found, beyond a reasonable doubt, that the answer to all three questions was "yes," then the death penalty was imposed. If the answer to any one of the three questions was "no," then life imprisonment was imposed.

dant's punishment can be no greater than life imprisonment. Thus, the "aggravating circumstances" set out in a particular state's capital punishment statute operate as "sentencing factors" that raise the defendant's potential maximum sentence above what would be permitted by the statute – and, perhaps, even by the Eighth Amendment – if no such "aggravating factor" were established. "Aggravating circumstances" in a death penalty case are thus virtually indistinguishable from the "sentencing factors" dealt with in *Apprendi*. As such, they should be subject to the same constitutional rules – meaning that, under *Apprendi*, they should be required to be found by a jury beyond a reasonable doubt.[36] But, as a matter of constitutional law, they are not.

At present, all death penalty jurisdictions require, by statute, proof beyond a reasonable doubt of the "aggravating circumstances" that support a death sentence. But not all jurisdictions require the mandatory finding of these "aggravating circumstances" to be made by a jury. In Florida, for example, the sentencing hearing takes place before a jury, but the jury's sentencing verdict may be overridden – in either direction – by the trial judge. And in Arizona, there is no sentencing jury at all; the entire sentencing hearing, including the finding of any "aggravating circumstances," involves only the trial judge.

In several cases, post-dating *Mullaney* but pre-dating *Apprendi*, the Court upheld the Florida and Arizona death penalty systems against constitutional challenges based on the respective roles of the jury and the trial judge. For example, in *Hildwin v. Florida*[37] and *Spaziano v. Florida*,[38] the Court concluded that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury."[39] Even more significantly, in 1990, in *Walton v. Arizona*,[40] the Court upheld the Arizona system against a claim that it violated the Sixth Amendment's right to trial by jury by giving to the trial judge (instead of a jury) the responsibility of finding the "aggravating circumstances" that could lead to imposition of a death sentence.

The *Walton* majority, in an opinion by Justice White, relied heavily on the earlier *Hildwin* and *Spaziano* decisions upholding the Florida system. The *Walton* majority explained that, under Arizona law:

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> [U]sing the terminology that the Court itself employs to describe the constitutional fault in the New Jersey sentencing scheme presented here, under Arizona law, the judge's finding that a statutory aggravating circumstance exists "exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone."

Apprendi, 120 S. Ct. at 2387-88 (O'Connor, J., dissenting) (emphasis in original).

37. 490 U.S. 638, 640-41 (1989) (per curiam).

38. 468 U.S. 447 (1984).

39. *Hildwin*, 490 U.S. at 640-41.

40. 497 U.S. 639 (1990).

> Aggravating circumstances are not separate penalties or offenses, but are "standards to guide the making of [the] choice" between the alternative verdicts of death and life imprisonment. Thus, . . . the judge's finding of any particular aggravating circumstance does not of itself "convict" a defendant (i.e., require the death penalty), and the failure to find any particular aggravating circumstance does not "acquit" a defendant (i.e., preclude the death penalty).[41]

In dissent on this issue,[42] Justice Stevens pointed out that "under Arizona law, . . . a first-degree murder is not punishable by a death sentence until at least one statutory aggravating circumstance has been proved," and argued that such aggravating circumstances thus "operate as statutory 'elements' of capital murder."[43] He claimed that, when the Sixth Amendment was adopted, "the jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was particularly well-established."[44]

Despite protestations to the contrary in *Apprendi*[45] and *Almendarez-Torres v. United States*,[46] the Court's decisions in the three capital cases of *Hildwin*, *Spaziano*, and *Walton* demonstrate that *Apprendi* marks a significant change in direction for the Court. Of course, it is possible to distinguish capital cases in almost every respect from non-capital cases, based on the special procedural rules that have been developed for capital cases under the Eighth Amendment,[47] but this distinction usually runs in the direction of *greater* procedural protection for capital defendants. In this context, however, the pre-*Apprendi* capital cases provide *less* procedural protection than *Apprendi* provided for non-capital defendants.

The death penalty cases are not the only examples in which the Court previously has upheld the use of "sentencing factors" resembling the ones at issue in

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41. *Id.* at 648 (quoting Poland v. Arizona, 476 U.S. 147, 156 (1986)).

42. Justices Brennan, Marshall, and Blackmun dissented on other grounds.

43. 497 U.S. at 709 & n.1.

44. *Id.* at 711.

45. *See* 120 S. Ct. at 2366 ("[T]his Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death."); *id.* at 2380 (Thomas, J., concurring) ("[I]n the area of capital punishment, unlike any other area, we have imposed special constraints on a legislature's ability to determine what facts shall lead to what punishment – we have restricted the legislature's ability to define crimes . . . . Whether this distinction between capital crimes and all others, or some other distinction, is sufficient to put the former outside the rule that I have stated is a question for another day.").

46. 523 U.S. 224, 257 n.2 (1998) (Scalia, J., dissenting) ("Neither [*Walton*, *Hildwin*, nor *Spaziano*] permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed – even where that decision is constrained by a statutory requirement that certain 'aggravating factors' must exist.").

47. *See* Margaret J. Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1148 (1980) (coining term, "super due process," to describe development of special procedural rules applicable only to capital cases).

Apprendi. Another leading example is the 1986 case of *McMillan v. Pennsylvania*.[48] In *McMillan*, the statute at issue provided that anyone convicted of certain felonies would be subject to a mandatory minimum sentence of five years in prison if the trial judge found, by a preponderance of the evidence, that the defendant "visibly possessed a firearm" during the commission of the crime.[49] The Court held, by a five-to-four majority, that the statute violated neither the Due Process Clause nor the Sixth Amendment's right to trial by jury. After coining the term, "sentencing factor," to describe the particular item at issue in *McMillan*, the Court declared:

> *Patterson* stressed that in determining what facts must be proved beyond a reasonable doubt the state legislature's definition of the elements of the offense is usually dispositive . . . . As *Patterson* recognized, of course, there are constitutional limits to the State's power in this regard; in certain limited circumstances *Winship*'s reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged . . . . While we have never attempted to define precisely the constitutional limits noted in *Patterson*, . . . we are persuaded by several factors that Pennsylvania's Mandatory Minimum Sentencing Act does not exceed those limits . . . . Our inability to lay down any "bright line" test may leave the constitutionality of statutes more like [the one in *Mullaney*] than is the Pennsylvania statute to depend on differences of degree, but the law is full of situations in which differences of degree produce different results. We have no doubt that Pennsylvania's Mandatory Minimum Sentencing Act falls on the permissible side of the constitutional line.[50]

The *Apprendi* Court claimed that *McMillan* actually supported the new rule announced therein because the "several factors" cited by the *McMillan* Court included the fact that the Pennsylvania statute "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm."[51] The *Apprendi* dissenters, however, seemed to have the better of the argument when they responded that

> [t]he Court's reliance on *McMillan* is also puzzling, given that our holding in that case points to the rejection of the Court's rule . . . . If any single rule can be derived from *McMillan*, it is . . . the following: When a State takes a fact that has always been considered by sentencing courts to bear on punishment, and dictates the precise weight that a court should give that fact in setting a

48. 477 U.S. 79, 91 (1986) (holding state may treat visible possession of firearm as sentencing consideration rather than element of particular offense to be proved beyond reasonable doubt).

49. 42 PA. CONS. STAT. § 9712 (1999).

50. 477 U.S. at 85-86, 91.

51. 120 S. Ct. at 2361 (quoting *McMillan*, 477 U.S. at 87).

> defendant's sentence, the relevant fact need not be proved to a jury beyond a reasonable doubt as would an element of the offense.[52]

In the end, perhaps the most telling remarks about such pre-*Apprendi* "sentencing factor" cases as *Hildwin*, *Spaziano*, *Walton*, and *McMillan*, were not those made in *Apprendi* itself, but the ones made by the author of the majority opinion in *Apprendi* – Justice Stevens – ten years earlier in his *Walton* dissent:

> By stretching the limits of sentencing determinations that are made by judges . . . , these decisions have encroached upon the factfinding function that has so long been entrusted to the jury. Further distorting the sentencing function to encompass findings of factual elements necessary to establish a capital offense is the unhappy product of the gradual "increase and spread" of these precedents, "to the utter disuse of juries in questions of the most momentous concern." [I]t is not too late to change our course . . . .[53]

Whatever one may think about the success of the efforts in *Apprendi* to distinguish earlier decisions like *Hildwin*, *Spaziano*, *Walton*, and *McMillan*, the fact remains that *Apprendi* represents a significant change of heart for the Court. In *Apprendi*, for the first time, the Court flatly rejected a legislature's carefully considered decision about whether or not a particular factor should be treated as an "element of the crime" for constitutional purposes.

What led to this change of heart? Why did a majority of the Court suddenly become concerned about the constitutional status of "sentencing factors," after readily accepting them for so long?

Perhaps one answer to this question can be found in the modern evolution of sentencing law and policy. Prior to the 1970s, sentencing was almost entirely within the discretion of the trial judge, and was virtually unreviewable on appeal.[54]

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52. *Id.* at 2386 (O'Connor, J., dissenting).

53. Walton v. Arizona, 497 U.S. 639, 713-14 (1990).

54. Judge Marvin Frankel, a former U.S. District Judge for the Southern District of New York and a prominent critic of discretionary sentencing, explained the situation as follows:

> The common form of criminal penalty provision confers upon the sentencing judge an enormous range of choice. The scope of what we call "discretion" permits imprisonment for anything from a day to one, five, 10, 20, or more years . . . .
>
> The statutes granting such powers characteristically say nothing about the factors to be weighed in moving to either end of the spectrum or to some place between. It might be supposed by some stranger arrived in our midst that the criteria for measuring a particular sentence would be discoverable outside the narrow limits of the statutes and would be known to the judicial experts rendering the judgments. But the supposition would lack substantial foundation. Even the most basic sentencing principles are not prescribed or stated with persuasive authority . . . .
>
> Moving upward from what should be the philosophical axioms of a rational scheme of sentencing law, we have no structure of rules, or even guidelines, affecting other elements arguably pertinent to the nature or severity of the sentence . . . . What factors should be assessed – and where, if anywhere, are comparisons to be sought – in gauging the relative seriousness of the specific offense and offender as against the spectrum of offenses by others in the same legal category? . . .

Largely in response to growing concerns about such unreviewable discretion, and the sentencing disparities it produced, a few states – and, eventually, the federal government as well – began to adopt new determinate sentencing systems based on "guidelines" that would help to channel the discretion of the sentencer. Led by the states of Minnesota, Pennsylvania, and Washington, these jurisdictions shifted from traditional discretionary sentencing to sentencing governed by rules and standards established by a "sentencing commission." Often (although not always) this shift to determinate sentencing was accompanied by the abolition of parole, thus requiring a convicted criminal to serve his or her entire sentence, minus any possible "good time" credits. In some states, the combination of determinate sentencing and abolition of parole came to be known by the politically popular label, "truth in sentencing."[55]

In theory, these new determinate sentencing systems were designed to fulfill all of the same goals as traditional discretionary sentencing, including deterrence, incapacitation, rehabilitation, and retribution.[56] But the trend toward determinate

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> With the delegation of power so unchanneled, it is surely no overstatement to say that "the new penology has resulted in vesting in judges and parole and probation agencies the greatest degree of uncontrolled power over the liberty of human beings that one can find in the legal system." The process would be totally unruly even if judges were superbly and uniformly trained for the solemn work of sentencing. As everyone knows, however, they are not trained at all . . . .
> The basic premise of the indeterminate sentence is the modern conception that *rehabilitation is the paramount goal in sentencing* . . . .

Marvin Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 4-6, 29-31 (1972) (emphasis added).

55. *See generally* U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *Special Report: Truth in Sentencing in State Prisons* (Jan. 1999) (describing evolution from traditional discretionary sentencing to determinate sentencing systems).

56. Thus, in the Sentencing Reform Act of 1984 creating the Federal Sentencing Guidelines, Congress provided that:

> (a) The court, in determining the particular sentence to be imposed, shall consider:
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed:
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
> (3) the kinds of sentences available;
> (4) the kinds of sentence and the sentencing range established for:
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; or
> (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code;
> (5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. [§] 994(a)(2) that is in effect on the date the defendant is sentenced;

sentencing also received a strong boost from the revival of Kantian retributivism as a justification for criminal punishment in America. Beginning in 1976 with the influential book, *Doing Justice*, authored by Andrew von Hirsch on behalf of the Committee for the Study of Incarceration (sponsored by the Field and New World Foundations),[57] and continuing through the 1980s, many commentators began to argue that the severity and duration of criminal punishment should be based primarily on what the criminal deserves – a matter at least theoretically susceptible to rational and predictable determination from the facts of the crime and the criminal's background – rather than on ad hoc predictions of future dangerousness, or findings by so-called "experts" about when a particular criminal has been adequately "rehabilitated."[58]

Given the fact that many modern determinate sentencing systems developed concurrently with the rebirth of retributivism, it is perhaps not surprising that these new systems often took on largely retributive characteristics. For example, although the Sentencing Reform Act of 1984 provided that individual sentences should reflect not only retribution but also deterrence, incapacitation, and rehabilitation,[59] the Federal Sentencing Guidelines themselves do not take into account many of the specific kinds of factors (including the defendant's educational background, level of job training, and family and community ties) that might affect a defendant's likelihood of rehabilitation. These factors specifically are mentioned in the enabling legislation, but are largely absent from the Guidelines.[60]

By shifting the focus of sentencing decisions from a complicated mixture of deterrence, incapacitation, rehabilitation, and retribution to a more single-minded

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(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a) (1990 & Supp. 2000).

57. ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS: REPORT OF THE COMMITTEE FOR THE STUDY OF INCARCERATION (1976) (discussing the results of a study of the sentencing process).

58.

> If one asks how severely a wrongdoer deserves to be punished, a familiar principle comes to mind: Severity of punishment should be commensurate with the seriousness of the wrong. Only grave wrongs merit severe penalties; minor misdeeds deserve lenient punishments. Disproportionate punishments are undeserved – severe sanctions for minor wrongs or vice versa.

Id. at 66.

59. *See* 18 U.S.C. § 3553(a).

60. *Compare* 28 U.S.C. § 994(d) (1988) (listing specific factors to be considered by the United States Sentencing Commission in determining appropriate categories of defendants, including (1) age, (2) education, (3) vocational skills, (4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability, (5) physical condition, including drug dependence, (6) previous employment record, (7) family ties and responsibilities, (8) community ties, (9) role in the offense, (10) criminal history, and (11) degree of dependence upon criminal activity for a livelihood), *with* Deanell Reece Tacha, *Serving This Time: Examining the Federal Sentencing Guidelines After a Decade of Experience*, 62 MO. L. REV. 471 (1997) (identifying only defendant's criminal history – including the number, seriousness, and recency of his prior offenses – as combining with the seriousness of the crime to determine defendant's sentence under the Guidelines).

emphasis on retributive "just deserts," the determinate sentencing movement of the 1980s and 1990s inadvertently helped to ensure that sentencing hearings would more closely resemble the same kind of inquiry into the facts and circumstances of the crime that occurs at a typical guilt/innocence trial. This resemblance is both superficial and substantive.

Under the Federal Sentencing Guidelines, for example, instead of asking (as was common in pre-Guideline days) whether the defendant's personal characteristics are conducive to rehabilitation or will require lengthy incapacitation, sentencing judges are now required to look mostly at the harm caused by the defendant's crime (whether or not the full parameters of that harm were proven at the guilt-innocence trial) and the defendant's prior criminal record.[61] These inquiries are, in a superficial sense, much more like the inquiries that take place at the guilt-innocence trial.

Moreover, the evolution of the goals of sentencing has also contributed to the newfound similarity between sentencing hearings and the typical guilt-innocence trial. In the past, it was possible to maintain at least the charade that the government, at sentencing, was no longer a pure adversary to the defendant. In a sentencing system based in part on rehabilitative principles, once the defendant was convicted of the crime charged, the government – and the trial judge – could be viewed (at least in theory) as acting in the best interests of the defendant.[62] Under a retributive guideline system, however, there is no mistaking the obvious fact that the government and the defendant remain adversarial throughout the sentencing stage of the proceedings. The goal of sentencing is no longer to do what might be best, in the long run, for the defendant – instead, the sentencing goal is to determine the true measure of the defendant's "just deserts," so as to make sure that the defendant does not get off too easily (nor suffer too harshly).[63]

This evolution in both the form and substance of sentencing hearings undoubtedly influenced the Court to see sentencing hearings as more like guilt/innocence trials than before. And this seems to be reflected in the Court's abrupt change of direction in *Apprendi*. In short, as an unintended consequence of the recent move from discretionary to determinate sentencing, sentencing hearings have begun to look more and more like adversarial proceedings, which in turn has helped to ensure that they will be treated, for constitutional purposes, more and more like

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61. *See* Tacha, *supra* note 60, at 476 (discussing changes in federal sentencing).

62. *See* Frankel, *supra* note 54, at 4-5 (noting that "[i]t has for some time been part of our proclaimed virtue that vengeance or retribution is a disfavored motive for punishment," and referring to the "modern conception that rehabilitation is the paramount goal of sentencing").

63. *See* VON HIRSCH, *supra* note 57, at 66 (discussing the idea of commensurate punishments).

adversarial proceedings.[64] *Apprendi*, in other words, is a natural and perhaps even predictable consequence of the recent trend toward adversarial-ness in sentencing.

If there is any doubt about the above claim, the likely result, under *Apprendi*, if a state were to enact a hypothetical statute providing as follows:

> In pursuit of the overriding goal of rehabilitation, a convicted defendant who lacks the equivalent of a high school education may be sentenced to an additional period of confinement, beyond the maximum otherwise authorized by the statute defining the crime of conviction, for up to one year, during which time the defendant will be provided with free coursework and tutoring designed to help the defendant earn a high school diploma.

Such a hypothetical statute may be subject to many different kinds of challenges, but would it be vulnerable to an *Apprendi* challenge? The hypothetical statute, if applicable, clearly would serve to increase the defendant's sentence above the statutorily authorized maximum punishment for the crime of conviction. Yet it seems highly unlikely that the defendant, in such a situation, would be entitled constitutionally to insist that his equivalent level of education be found by a jury beyond a reasonable doubt. This example suggests that *Apprendi* may someday be limited to those "sentencing factors" that – like many of those that appear in current sentencing guidelines – serve primarily a retributive role.

IV. CONSTITUTIONAL DEJA VU

In a very real sense, the Supreme Court's decision in *Apprendi* turned the jurisprudential clock back more than three decades. The story of *Apprendi* can be traced directly back to 1970 and the landmark case of *In re Winship*.[65]

Winship involved a juvenile who was charged, in New York Family Court, with an act – namely, the theft of $112 from a woman's pocketbook in a locker – that would have been a crime if committed by an adult. At an adjudicatory hearing to determine whether or not the juvenile was "delinquent," the trial judge determined by a preponderance of the evidence (pursuant to state statute) that the juvenile had committed the act. The Court reversed. According to Justice Brennan's majority opinion, "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[66] The *Winship* Court also held that "[t]he same

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64. On the nature of adversarial proceedings, see Gary Goodpaster, *Criminal Law: On the Theory of the American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118 (1987); Stephan A. Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713 (1983). Goodpaster, in particular, notes that societal norm creation is, in America, one of the main functions of juries. *See* Goodpaster, *supra*, at 151. Thus, once again, it is perhaps not surprising that as sentencing hearings become more and more normative (and less utilitarian), there would be a greater tendency to define a larger role for juries in sentencing.

65. 397 U.S. 358 (1970).

66. *Id.* at 364.

considerations that demand extreme caution in factfinding to protect the innocent adult apply as well to the innocent child."[67]

Five years later, in the case of *Mullaney v. Wilbur*,[68] the Court faced a due process challenge to a Maine statute that placed on the defendant in a homicide case the burden of proving by a preponderance of the evidence that the killing had occurred in the heat of passion in order to reduce the crime from murder to manslaughter.[69] In *Mullaney*, a unanimous Court found the Maine statute unconstitutional. The Court based its decision directly on *Winship*, explaining that the earlier case cannot be "limited to those facts that constitute a crime as defined by state law;" otherwise, the legislature could "undermine many of the interests that decision sought to protect" by "redefin[ing] the elements that constitute different crimes, characterizing them [instead] as factors that bear solely on the extent of punishment."[70] The Court noted that, if the legislature were allowed to shift the burden of persuasion in the manner provided in the statute, "Maine could impose a life sentence for any felonious homicide . . . unless the *defendant* was able to prove that his act was neither intentional nor criminally reckless."[71] The Court emphasized that "*Winship* is concerned with substance rather than this kind of formalism."[72]

Mullaney clearly carried within it the potential to invalidate all "affirmative defenses" that shifted the burden of persuasion to the defendant on any matter relating to guilt, innocence, or degrees of culpability. Just two years after *Mullaney*, however, in *Patterson v. New York*,[73] a five-Justice majority of the Court seemingly reversed course.

Patterson involved a New York statute, similar to the Maine statute in *Mullaney*, that placed on the defendant in a second-degree murder case the burden of proving the "affirmative defense" that the killing was the result of "extreme emotional disturbance for which there was a reasonable explanation or excuse;" such proof had the effect of reducing the crime from second-degree murder to manslaughter.[74] The *Patterson* Court upheld the constitutionality of the New York statute, distinguishing *Mullaney* on the ground that the statute in *Patterson* did not make the absence of "extreme emotional disturbance" an element of second-degree murder, but instead provided only that the existence of such a factor would serve as an

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67. *Id.* at 365.

68. 421 U.S. 684 (1975).

69. *See* ME. REV. STAT. ANN. tit. 17, § 2551 (West 1964) (repealed 1975) (establishing the offense of manslaughter); ME. REV. STAT. ANN. tit. 17, § 2651 (West 1964) (repealed 1975) (establishing the offense of murder).

70. 421 U.S. at 698.

71. *Id.* at 699 (emphasis in original).

72. *Id.*

73. 432 U.S. 197 (1977).

74. *See* N.Y. PENAL LAW §§ 125.20(2), 125.25 (McKinney 1975).

"affirmative defense" to the crime. In language presaging the "sentencing factor" controversy in *Apprendi*, the *Patterson* Court explained:

> *Mullaney*'s holding, it is argued, is that the State may not permit the blameworthiness of an act *or the severity of punishment authorized for its commission* to depend on the presence or absence of an identified fact without assuming the burden of proving the presence or absence of that fact, as the case may be, beyond a reasonable doubt. In our view, the *Mullaney* holding should not be so broadly read . . . . *Mullaney* surely held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense . . . . Such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause. It was unnecessary to go further in *Mullaney* . . . .[75]

The *Patterson* Court also drew an analogy to the insanity defense, which previously had been held by the Court to be an "ingredient" that the defendant constitutionally could be required to prove,[76] and noted that a contrary result might cause legislatures to eliminate such "affirmative defenses" entirely. The Court concluded:

> [E]ven if we were to hold that a State must prove sanity to convict once that fact is put in issue, it would not necessarily follow that a State must prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of the punishment . . . .We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused . . . . This view may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some of the elements of the crimes now defined in their statutes. But there are obviously constitutional limits beyond which the States may not go in this regard . . . .[77]

After *Patterson*, it was clear that a majority of the Court was prepared to grant much greater deference to legislative judgments about "elements of a crime" and "affirmative defenses" than had been permitted in *Mullaney*.[78] Indeed, the dissent-

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75. *Patterson*, 432 U.S. at 214-15 (emphasis added).

76. *See* Rivera v. Delaware, 429 U.S. 877 (1976) (dismissing for lack of a federal question an appeal from state supreme court ruling that sustained law requiring defendant to prove insanity by preponderance of the evidence); Leland v. Oregon, 343 U.S. 790 (1952) (upholding state law requiring defendant who raises insanity defense to prove insanity beyond a reasonable doubt).

77. *Patterson*, 432 U.S. at 207, 210.

78. Following *Mullaney*, which struck down Maine's common law defense of provocation, it appeared not only as though the answer to the question whether there are constitutional limits on the definition of criminality

ers in *Patterson* bitterly complained that "the Court today drains *In re Winship* . . . of much of its vitality . . . . The Court manages to run a constitutional boundary line through the barely visible space that separates Maine's law from New York's. It does so on the basis of distinctions in language that are formalistic rather than substantive."[79]

At the same time, the *Patterson* majority expressly indicated that legislatures would not be given carte blanche to shift items as they wished between the two categories; rather, the Court simply seemed to be leaving for another day the tough task of defining the "constitutional limits beyond which the [legislature] may not go."[80]

But what are these "constitutional limits?" The *Patterson* Court identified only one relatively obvious and uncontroversial limit – that the legislature cannot "declare an individual guilty or presumptively guilty of a crime."[81] No other examples were given. This left the Court wide open to the dissent's criticism that the *Patterson* rule was based on pure formalism; in essence, whatever a legislature chose to define as an "affirmative defense," instead of an "element of the crime," it could so do, as long as the statute was clearly drafted to do so.

Academic commentary on *Mullaney* and *Patterson*, at the time, was virtually unanimous in concluding that the two decisions were in conflict with one another, and that *Patterson* represented a retreat from the broad substantive propositions established in *Mullaney*. There was less consensus, however, on exactly where the constitutional "boundary line" should be drawn between permissible and impermissible legislative redefinition of the "elements of a crime."

Perhaps the most important proposals in this regard were the suggestions, made by Ronald J. Allen[82] and by John Jeffries and Paul Stephan,[83] that the limits on the legislature should be determined by reference to Eighth Amendment proportionality analysis. Under such an analysis, the legislature would be allowed to move items freely, from "elements of the crime" to "affirmative defenses," so long as the remaining facts required to be found by a jury beyond a reasonable doubt would be enough to justify *in a substantive sense* the defendant's maximum authorized punishment under the relevant crime statute.

In other words, these commentators argued that the maximum authorized punishment always must remain proportional to the defendant's crime, as defined by the "elements of the crime" set forth in the statute *and* as found by the jury beyond a reasonable doubt. So long as this rough notion of proportionality was

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was "yes," but also that no affirmative defenses were allowable. This was too much for the Court, rightly so, and in *Patterson* it upheld a functionally identical statute articulated in the vocabulary of the Model Penal Code, signaling that it had erred in *Mullaney*. *See* Allen, *supra* note 6, at 644.

79. 432 U.S. at 216, 221 (Powell, J., dissenting).

80. *Id.* at 210.

81. *Id.*

82. Allen, Mullaney v. Wilbur, *supra* note 5; Allen, *The Restoration*, *supra* note 5.

83. Jeffries & Stephan, *supra* note 5.

maintained, then any *other* items could be shifted from the "elements of the crime" to the separate category of "affirmative defenses," because even in their absence the defendant still could be given the maximum authorized punishment under the statute without violating the Eighth Amendment.

With the exception of a single decision in the mid-1980s,[84] however, the Court never returned to the subject of "affirmative defenses" that had been raised in *Mullaney* and *Patterson*. The Court never seriously considered or discussed the substantive proposals mentioned above, and likewise never attempted to draw the line between permissible and impermissible legislative manipulation that was referenced (but never clarified) in *Patterson*. Instead, the *Winship/Mullaney/Patterson* line of "affirmative defense" decisions essentially died out, with barely a whimper. And the subject remained dead, for the most part, until it was revived in the cases leading up to *Apprendi*.[85]

V. BACK TO THE FUTURE?

Having noted the similarity between the theoretical issue underlying *Apprendi* and the one involved in *Winship*, *Mullaney*, and *Patterson*, it is also important to point out that the two situations certainly are not identical. And the differences are important enough to suggest that the *Apprendi* issue may well have a longer lifespan, and a much more significant practical impact, than the *Winship/Mullaney/Patterson* issue that preceded it.

When the Court in *Patterson* essentially freed legislatures from the strictures of *Mullaney*, many feared the worst – that legislatures would seize the opportunity to shift many factors from the category of "elements of the crime" to the category of "affirmative defenses," thus shifting the burden of proof and tipping the scales of justice against defendants.[86] But the worst never actually occurred. In fact, with the important exception of the effort in many jurisdictions, after the Hinckley trial, to shift the burden of proof to the defendant on the insanity defense,[87] very few

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84. *See* Martin v. Ohio, 480 U.S. 228 (1987).

85. *See* Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000); Jones v. United States, 526 U.S. 227 (1999); Almendarez-Torres v. United States, 523 U.S. 224 (1998).

86.

> The test the Court today establishes allows a legislature to shift, virtually at will, the burden of persuasion with respect to any factor in a criminal case, so long as it is careful not to mention the nonexistence of that factor in the statutory language that defines the crime. The sole requirement is that any references to the factor be confined to those sections that provide for an affirmative defense . . . . Nothing in the Court's opinion prevents a legislature from applying this new learning to many of the classical elements of the crimes it punishes.

Patterson v. New York, 432 U.S. 197, 223-24 (1977) (Powell, J., dissenting).

87. *See generally* LINCOLN CAPLAN, THE INSANITY DEFENSE AND THE TRIAL OF JOHN W. HINCKLEY, JR. (1984) (discussing various legislative reforms concerning the insanity defense enacted shortly after Hinckley was found not guilty by reason of insanity in the shooting of President Ronald Reagan and several other persons); United States v. Hinckley, 525 F. Supp. 1342 (D.D.C. 1981), *clarified*, 529 F. Supp. 520 (D.D.C.), *aff'd*, 672 F.2d 115

criminal statutes were rewritten to take advantage of the leeway provided by *Patterson*.[88] One reason for this legislative inactivity may have been a reluctance to test the ambiguous limits set out in *Patterson*. Who knew, at the time, the precise location of those "constitutional limits beyond which the States may not go?"[89]

Such doubts, however, mostly were eliminated in 1986 when the Court handed down its decision in *Martin v. Ohio*.[90] *Martin* involved a constitutional challenge to an Ohio statute placing on the defendant the burden of proving by a preponderance of the evidence, as an "affirmative defense" to a murder charge, that the killing was committed in self-defense.[91] At the time, almost every other state – forty-eight out of fifty – followed the traditional rule that treated the absence of self-defense as an element of the crime of murder to be proven by the prosecution to the jury beyond a reasonable doubt, in any case where the defendant properly placed self-defense at issue.[92]

The Court in *Martin* upheld the Ohio statute, essentially confirming that the *Patterson* decision placed virtually no limits on the legislature's power to define "affirmative defenses" and thereby shift the burdens of proof:

> As in *Patterson*, the jury was here instructed that to convict it must find, in light of all the evidence, that each of the elements of the crime of aggravated murder has been proved by the State beyond reasonable doubt, and that the burden of proof with respect to these elements did not shift . . . . The State did not exceed its authority in defining the crime of murder as purposely causing the death of another with prior calculation and design . . .[93]

but at the same time requiring the defendant to prove, by a preponderance of the evidence, that such a killing was in self-defense.

After *Martin*, it was clear that virtually any legislative shifting of any item from the category of "element of the crime" to the category of "affirmative defense" would, at least if clearly expressed in the statute, pass constitutional muster. In other words, after *Martin*, it was extremely easy for legislatures to shift the burden

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(D.C. Cir. 1982) (holding government must make a clear showing that defendant did not lack criminal responsibility because of mental state).

88. *See* McMillan v. Pennsylvania, 477 U.S. 79, 89 (1986) ("Finally, we note that the specter raised by petitioners of States restructuring existing crimes in order to 'evade' the commands of *Winship* just does not appear in this case."); *Patterson*, 432 U.S. at 211 ("Long before *Winship*, the universal rule in this country was that the prosecution must prove guilt beyond a reasonable doubt. At the same time, the long-accepted rule was that it was constitutionally permissible to provide that various affirmative defenses were to be proved by the defendant. This did not lead to such abuses or to such widespread redefinition of crime and reduction of the prosecution's burden that a new constitutional rule was required.").

89. *Patterson*, 432 U.S. at 210.

90. 480 U.S. 228 (1987).

91. OHIO REV. CODE ANN. § 2901.05(A) (1982).

92. *See Martin*, 480 U.S. at 236 (noting that all states except Ohio and South Carolina required prosecution to prove absence of self-defense when properly raised by defendant).

93. *Id.* at 233.

of proof, on virtually any item, from the prosecution to the defense. Why, then, didn't legislatures engage in wholesale shifting of the burden of proof?

The answer may lie in a variant of the "political process" theory of constitutional adjudication most often associated with John Hart Ely. According to Ely, courts can best avoid the counter-majoritarian dilemma by focusing their attention on situations where the minority at issue is incapable of protecting its own interests through the political system, either because of obstructions by the politically powerful or simply because the minority is "discrete and insular" and thus lacks political power.[94] The flip side to Ely's theory is that courts need not act so forcefully to protect minority interests when those interests are capable of being protected adequately through the political system – such as will likely happen when the minority's interests are aligned, at least in large part, with the interests of the majority.

One of Ely's best examples was the constitutional law of the death penalty. He argued that *Furman v. Georgia*[95] and other Eighth Amendment decisions demonstrate the wisdom of the "political process" theory, as well as the need for active judicial review in capital cases. The problem is that the legislators who enact capital punishment statutes typically do so with the full knowledge that they, their families, and their friends will likely never be subject to such statutes (or to the ultimate punishment that they authorize). And those who *are* likely to become subject to such statutes – namely, convicted murderers – are the classic case of a "discrete and insular minority" lacking political power.[96]

In Ely's terms, it is not necessary for courts to worry about the problem of legislative shifting of the burden of proof in a criminal case, with respect to some item traditionally viewed as an "element of the crime," because such a shift might adversely affect even those persons who might vote for it in the legislature (or other persons like them). Take *Martin v. Ohio*[97] as a case in point. It is undoubtedly possible, indeed foreseeable, that anyone – including a law-abiding state legislator, family member, or friend – someday might wind up in a position where he might have to defend his own life against attack by another person. Under the Ohio statute challenged in *Martin*, however, one who kills under such circumstances must bear the burden of proving, to the jury's satisfaction, that the killing was in self-defense – or risk a murder conviction.

The *Apprendi* issue, however, is different. Under *Apprendi*, the class of persons affected by the creation of "sentencing factors" typically does not include legislators or their families or friends. This is because most such "sentencing

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94. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 102-04 (1980).

95. 408 U.S. 238, 239-40 (1972) (holding the death penalty, as carried out by the state of Georgia, constituted cruel and unusual punishment).

96. ELY, *supra* note 94, at 173-77.

97. 480 U.S. at 228 (holding that placing on defendant the burden of proving that she was acting in self-defense when she committed aggravated murder did not violate due process).

factors" are *enhancements* – meaning that they merely *enhance* the sentence for someone who already has been convicted of a crime. To put it another way, *Apprendi* deals with factors that do not define the line between *law-abiding citizen* and *criminal*; instead, they define the line between *criminal* and *worse criminal.*

This is a crucial difference, in terms of Ely's "political process" theory. Whereas legislators might be naturally constrained from altering the line between *law-abiding citizen* and *criminal* (fearing that they, or someone like them, might be caught unfairly on the wrong side of the line), they likely will feel no such constraint about altering the line between *criminal* and *worse criminal* (because they are unlikely to see themselves, or anyone like them, as a criminal in the first place).

In fact, in contemporary American politics, legislatively altering the line between *criminal* and *worse criminal* has become a booming business.[98] The recent expansions of the death penalty, the enactment of three-strikes legislation, the addition of hate-crime enhancements, and the adoption of mandatory minimum sentencing laws all reflect this political reality.[99] Criminals, even if they are not murderers, are clearly a "discrete and insular minority" with little or no political power. As such, they are a prime target for legislators seeking to curry favor with the law-abiding public.[100]

This is why the *Apprendi* issue may well prove to be more long-lived, and much more practically significant, than the *Winship/Mullaney/Patterson* issue turned out to be. Every time a statute or determinate sentencing guideline is invalidated under *Apprendi*, the temptation will be great for the relevant legislature simply to amend the statute and fix the constitutional problem. Indeed, legislatures may not even

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98. *See generally* Sara Sun Beale, *What's Law Got To Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23 (1997) (discussing possible reasons why the American public, and hence American political leaders, focus so much attention on crime-control issues).

99. *See id.* at 23-31 (discussing the disparity between criminal justice policy and the recommendations of criminal justice experts); UNITED STATES SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991); Samuel H. Pillsbury, *Why Are We Ignored? The Peculiar Place of Experts in the Current Debate About Crime and Justice*, 31 CRIM. L. BULL. 305 (1995) (discussing the tendency of public policy debates to ignore the opinions of criminal justice experts); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 259 & nn. 211-12 (1993) (discussing the enactment of mandatory minimum sentences); Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 202-08 (1993) (discussing the structure of mandatory minimum sentences).

100. Another example that may help further to make this point is the continued vitality of the felony-murder rule in a world where strict criminal liability otherwise has been universally condemned and largely eliminated. "One can view [the] attack on strict liability as a simple class-biased, result-oriented defense of corporate managers, those persons most likely to 'unintentionally' harm others through routine business operations. Certainly, the bulk of strict liability crimes are regulatory crimes which, unlike the traditional common law incidental harms, are most likely to be committed by those who [control] the means of production." Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 610 (1981). On the other hand, the felony-murder rule may survive, and even prosper, because it is a form of strict liability imposed against the "discrete and insular minority" who already have committed a felony crime.

wait to respond to *Apprendi* decisions; instead, they may find it politically advantageous to embark on a proactive review of their sentencing laws generally in order to identify and fix *Apprendi* problems before they arise.

But how can a legislature fix an *Apprendi* problem? If the only remedy available were to provide for complete jury determinations, beyond a reasonable doubt, of all "sentencing factors" that had an adverse impact on defendants, then the end result might be exactly what at least some members of the *Apprendi* Court desire.[101] The problem, however, is that *Apprendi* also seems to allow an entirely different kind of remedy.

Can't a legislature fix an *Apprendi* problem simply by adding, to the relevant crime statute, a new provision stating that the maximum statutorily authorized punishment for the crime will be life imprisonment (or another punishment more severe than the highest "enhanced" punishment that could result from the challenged "sentencing factors")? Once the maximum punishment provided in the statute has been so increased, won't any "sentencing factor" used to determine the defendant's eligibility for heightened punishment – even if found by the trial judge, on less than proof beyond a reasonable doubt – satisfy *Apprendi*'s constitutional requirements?"

Apprendi, by its terms, would seem to permit such a remedy.[102] In *Apprendi*, after all, the Court was very careful to limit its holding to "sentencing factors" (other than prior convictions) that have the effect of raising a defendant's sentence *above the maximum statutorily authorized punishment for the crime of conviction.*[103] Although some of the Justices obviously would have preferred to go farther and overrule *Walton*, *McMillan*, and/or *Almendarez-Torres*,[104] the majority

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101. *See, e.g.*, Douglas A. Berman, *Appraising and Appreciating* Apprendi, 12 FED. SENT. REP. 303, 305 (2000) (suggesting that "legislatures and sentencing commissions should appreciate the simple, fundamental policy message which *Apprendi* radiates: procedures really matter at sentencing"); Alan C. Michaels, *Truth in Convicting: Understanding and Evaluating* Apprendi, 12 FED. SENT. REP. 320 (2000) ("New Jersey plainly could avoid the *Apprendi* problem by redrafting the statute to make [biased] purpose an element of the weapons possession offense in the traditional sense, and require that it be proven to the jury beyond a reasonable doubt.").

102. *See, e.g.*, Michaels, *supra* note 101, at 320-21 (describing how the New Jersey legislature could enact a "Revised Penalty Statute" identical to the one in *Apprendi* but with a higher statutory maximum penalty of 20 years (instead of the original 10-year statutory maximum penalty), and concluding that such a "Revised Penalty Statute" "would not run afoul of *Apprendi*'s rule as articulated by the Justices in that case . . .").

103. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt . . . . 'It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.'" *Apprendi*, 120 S. Ct. at 455 (emphasis added) (quoting Jones v. United States, 526 U.S. 227, 252-53 (Stevens, J., concurring)).

104. *See Apprendi*, 120 S. Ct. at 2361 ("[W]e reserve for another day the question whether stare decisis considerations preclude reconsideration of [*McMillan*]."); *id.* at 2362 ("Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, *Apprendi* does not contest the decision's validity and we need not revisit it for purposes of our decision today . . . ."); *id.* at 2362 (Thomas, J., concurring) (suggesting that *Walton*, *McMillan*, and *Almendarez-Torres* all were decided incorrectly); *Jones*, 526 U.S. at 253 (Stevens, J., concurring) ("If

opinion reserved any future revisiting of those earlier cases, instead carving out a narrower rule that represents only an incremental step away from prior Court precedents.

Having done so, however, the invitation to legislatures is clear. If a legislature does not agree with the outcome of an *Apprendi* decision, it simply can go ahead and amend the relevant crime statute to provide for a higher maximum authorized punishment. By doing so, the legislature seemingly can avoid entirely the actual holding in *Apprendi*, and thereby save the challenged "sentence enhancement" scheme.[105]

Some commentators, perhaps seeking to avoid the problems inherent in the search for a meaningful substantive limit on legislative power in this context (problems that became apparent during the earlier debate over *Winship*, *Mullaney*, and *Patterson*), have already expressed the opinion that *Apprendi*'s "formalistic" approach can be justified in terms of its impact on the legislative process. For example, Benjamin Priester, in this same issue, makes just such an argument. According to Priester:

> The *Apprendi* principle preserves the integrity of our constitutional doctrines by requiring that the legislature respect the distinction between its offense-defining and sentencing-regulating powers. These are separate powers over independent and constitutionally distinct stages of the criminal justice process . . . . Viewing the *Apprendi* principle as a protective barrier between two legislative powers places the principle in good constitutional company. There are many examples in constitutional law of both principles that preserve formal distinctions and principles that restrict the means by which the legislature may achieve a desired end . . . . [T]he *Apprendi* principle increases the transparency of the criminal justice system . . . . Although the value of the political process as a check against excesses of the legislature in this area may be overrated, that is no reason not to require the legislature to write statutes that comply with the constitutional division between offense-defining and sentencing-regulating powers.[106]

Such an argument not only seeks to defend *Apprendi* but also offers the hope that its limited holding – because it nevertheless serves a useful purpose – can be sustained intact over time.

But can *Apprendi* ever manage to achieve a stable equilibrium? Are there any political limits that will prevent a legislature from simply adopting what might be

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McMillan . . . and Part II of the Court's opinion in *Walton* . . . departed from [the principles of *In re Winship*], as I think they did, . . . they should be reconsidered in due course.").

105. *See* Benjamin J. Priester, *Constitutional Formalism and the Meaning of* Apprendi v. New Jersey, 38 AM. CRIM. L. REV. 281 (2001) ("So long as the legislature properly states a single highest possible maximum sentence in an offense-defining provision, it also may impose its intended mandatory subsidiary sentencing gradations in expressly delineated, separated, statutory or non-statutory sentencing regulations.").

106. Priester, *supra* note 105, at 303-04.

called the "quick fix," formalistic solution to any *Apprendi* problems that may arise? Compared to the shifting of an item from the category of an "element of the crime" to the category of an "affirmative defense," the legislative decision to amend a crime statute by increasing the maximum statutorily authorized punishment – especially to a level that is no higher than the level already authorized by a separate sentencing enhancement or sentencing guideline – seems a relatively simple and painless one. Indeed, it is the kind of decision that probably would prove to be politically advantageous. After all, whose ox is gored by such a decision? The only persons affected by such a decision would be those who are convicted of the particular crime at issue – and, as noted previously, criminals generally do not have effective lobbyists.

For these reasons, I am far less persuaded than some that the *Apprendi* issue will fade quickly. Whenever a court rules against a sentence enhancement on *Apprendi* grounds, as the Ninth Circuit and other courts already have done in the context of federal drug sentences under 21 U.S.C. § 841(b)(1),[107] it seems highly likely that the relevant legislature – prodded by prosecutors who surely will not want to have to prove sentencing enhancements, such as drug quantities, to a jury beyond a reasonable doubt in all cases – simply will get to work and amend the statutes. As noted above, interested legislatures can "quick fix" the *Apprendi* problem simply by raising the statutory maximum authorized punishments so that the sentencing enhancements or sentencing guidelines will technically pass muster under *Apprendi*.

And then the Court will find itself between a rock and a hard place. If the Court truly is committed to holding the line on the *Apprendi* holding, and if it refuses to extend that holding to its logical consequences, then *Apprendi* quickly will become a meaningless formalism. This is exactly what happened to *Mullaney* in *Patterson* – except that, in that earlier context, legislatures generally declined to take full advantage of the situation. Here, in the case of sentencing enhancements, they likely will.

To put it another way, unless *Apprendi*'s holding is extended, the decision seems unlikely even to slow, let alone shut down, the recent "growth industry" in legislatively enacted sentencing enhancements – including enhancements that raise a defendant's punishment so much that they fairly could be described as the "tail that wags the dog"[108] – that do not require jury findings beyond a reasonable doubt. Instead, *Apprendi* will only force legislatures to do a slightly better job of

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107. *See, e.g.*, United States v. Doggett, 230 F.3d 160 (5th Cir. 2000); United States v. Sheppard, 219 F.3d 766 (8th Cir. 2000); United States v. Nordby, 225 F.3d 1053 (9th Cir. 2000); United States v. Rogers, 228 F.3d 1318 (11th Cir. 2000).

108. *See Apprendi*, 120 S. Ct. at 2361 (referring to statutes which give the "impression of having been tailored to permit the [sentence enhancement] finding to be a tail which wags the dog of the substantive offense," presumably because the enhancement is so large compared to the underlying punishment for the non-enhanced crime) (quoting McMillan v. Pennsylvania, 477 U.S. 79, 87-88 (1986)).

drafting the crime statutes to which such sentencing enhancements are attached. In the words of the *Apprendi* dissenters, "[I]t is possible that the Court's 'increase in the maximum penalty' rule rests on a meaningless formalism that accords, at best, marginal protection for the constitutional rights that it seeks to effectuate."[109]

If a majority of the Court truly wants to get rid of such sentencing enhancements the only viable alternative will be to extend *Apprendi* – on substantive grounds rather than purely formalistic ones – and thereby preempt or invalidate the likely legislative manipulations.[110] What substantive grounds will the Court choose? It is impossible to say. Past wisdom in the *Winship/Mullaney/Patterson* context suggests that proportionality might be the best way to go, but that suggestion was made long before the Court, in *Harmelin v. Michigan*,[111] cut the legs out from under the Eighth Amendment proportionality doctrine. After *Harmelin*, the Court may find itself back to square one in attempting to find a sound substantive (i.e., non-formalistic) basis for limiting legislative power in this area. Other substantive bases have been proposed, but none has garnered much support to date.[112]

VI. CONCLUSION

Those who fail to learn from history, it is said, are doomed to repeat it. In the case of *Apprendi*, however, history is an imperfect guide. Although the *Apprendi* issue may resemble the controversy over "affirmative defenses" in older cases like *Mullaney* and *Patterson*, important differences – such as the legislature's likely

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109. *Apprendi*, 120 S. Ct. at 2389 (O'Connor, J., dissenting).

110. *See* Priester, *supra* note 105, at 306 n.132 ("*Apprendi* may foreshadow not only additional procedural restrictions on sentencing but also future substantive limitations on the sentencing-regulating power *itself*.").

111. 501 U.S. 957, 994 (1991) (plurality opinion) (holding that mandatory life sentence, without possibility of parole, for first offense of simple possession of small amount of crack cocaine did not violate Eighth Amendment; a majority of the Justices agreed that proportionality analysis under Eighth Amendment is largely limited to capital cases).

112. *See, e.g.*, Donald A. Dripps, *The Constitutional Status of the Reasonable Doubt Rule*, 75 CAL. L. REV. 1665 (1987) (proposing heightened standards of proof at sentencing generally); Sara Sun Beale, *Procedural Issues Raised by Guidelines Sentencing: The Constitutional Significance of the "Elements of the Sentence,"* 35 WM. & MARY L. REV. 147 (1993) (proposing application to sentencing of other procedural protections, such as evidence rules); Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 SO. CAL. L. REV. 289 (1992) (proposing that all offense-related facts be determined during the guilt-innocence trial); Frank R. Herrmann, *"Understanding" Maximum Sentence Enhancements*, 46 BUFF. L. REV. 175 (1998) (proposing that all maximum-enhancing factors be proven to a jury beyond a reasonable doubt); Note, *Awaiting the Mikado: Limiting Legislative Discretion to Define Criminal Elements and Sentencing Factors*, 112 HARV. L. REV. 1349 (1999) (proposing "criminal estoppel" system, under which any issue previously established at the guilt-innocence trial could be relied upon by the government to enhance the defendant's sentence); Richard G. Singer & Mark D. Knoll, *Elements and Sentencing Factors: A Reassessment of the Alleged Distinction*, 12 FED. SENT. REP. 203 (2000) (proposing "functional" test that would examine fairness to the defendant, the risk of error, the burden on the government, and stigmatization); Richard G. Singer, *Searching for the "Tail of the Dog": Finding "Elements" of Crimes in the Wake of* McMillan v. Pennsylvania, 22 SEATTLE U. L. REV. 1057 (1999) (proposing jury-centered approach to determination of sentencing factors).

greater willingness to push the outer limits of the formalistic approach set forth in *Apprendi* – exist.

Because of these differences, the *Apprendi* issue seems likely to remain a "hot" one, perhaps for years to come. The Court likely will find itself incapable of controlling legislative excesses in the area of determinate sentencing law unless and until it decides to extend the *Apprendi* holding in search of a substantive, rather than a purely formalistic, basis for limiting the legislature's authority. Having recently gutted the Eighth Amendment proportionality doctrine, however, the Court has one fewer weapon in its substantive arsenal than it did twenty-five years ago, when *Mullaney* and *Patterson* were decided. This does not bode well for the Court's chances of ultimate success.

Nevertheless, I believe that the Court must go one way or the other on *Apprendi*. Either the decision is, as the dissenters suggested, a "meaningless formalism" that will do more harm than good, or it is a bold decision that marks a new beginning for the Court in the area of substantive criminal law. Either way, however, *Apprendi* – in its current form – seems destined for a short and unproductive existence.